

This record is a partial extract of the original cable. The full text of the original cable is not available.

UNCLAS ALMATY 000753

SIPDIS

DEPT FOR EB/IPE SWILSON, EUR/CACEN (JMUDGE)  
DEPT PLEASE PASS TO USTR JCHOE-GROVES,  
DOC JBOGER,  
USPTO JURBAN,  
LOC STEPP

E.O. 12958: N/A

TAGS: [ETRD](#) [KIPR](#) [ECON](#) [KZ](#) [ECONOMIC](#)

SUBJECT: KAZAKHSTAN: SPECIAL 301:

REF: (A) STATE 023950

- (B) 04 ALMATY 000591 (NOTAL)
- (C) 04 ALMATY 001310 (NOTAL)
- (D) 04 ALMATY 1434 (NOTAL)

1. Summary: Since the release of the 2004 Special 301 report, the Government of Kazakhstan (GOK) has worked actively and with notable success to modernize and strengthen its IPR regime. As WTO accession has increased in importance as a political goal, the GOK has fully accepted that a modern, functioning IPR regime is a prerequisite for participation in the global trading system. In this reporting period the GOK ratified the WIPO Copyright and Performances and Phonograms Treaties, guaranteed protection to pre-existing works in its Copyright Law and dramatically ramped up its enforcement efforts. Further legal changes, most notably amendments lowering the criminality threshold for IPR violations, are working their way through the Parliament. While the situation is not yet ideal, it is clear that the GOK has responded decisively to the pressure of being on the Watch List. The Embassy believes that the GOK's desire for WTO accession on a timetable coincident with or before Russia's will provide sufficient impetus to carry through further necessary improvements. We believe that Watch List pressure has served its purpose. Removal of Kazakhstan from the list will significantly assist the government in consolidating support in key constituencies for further reforms, as the country heads toward WTO accession. We therefore recommend removing Kazakhstan from the Watch List. End Summary.

#### 2004 - Significant Legal Changes With More to Come

-----

2. In this reporting period, Kazakhstan took several positive legal steps which, at the time of the last report (Reftel B), were initial proposals. The U.S. Government urged Kazakhstan to ratify the WIPO Treaties on Copyrights and Performances and Phonograms, which it did (Reftel D.) The United States also urged Kazakhstan to explicitly extend protection to pre-existing works (retroactive protection), which Kazakhstan committed to do when it joined the Berne Convention as well as in its 1992 bilateral trade agreement with the United States. The GOK dropped its previous insistence that its automatic incorporation of treaties into domestic law sufficed and piloted this change through the Parliament, fulfilling its obligation. The amendment, which was approved July 9, 2004, extends protection to any material that has not become a part of the public domain in its country of origin. The new provision extends the protection for a period of fifty years.

3. There remain a few areas in which further legal reform would enhance the GOK's effectiveness in enforcement and also more closely align the country's legislation with WTO norms. USTR has pointed out certain areas of the Customs Code, in particular the apparent lack of ex officio authority for customs officials, which weakens enforcement against imports of counterfeit articles. The GOK has not amended the Customs Code since it went into effect in 2003. However, the GOK maintains that the subject authority is found elsewhere in Kazakhstani law and applies to the customs authorities.

4. Similarly, Kazakhstani law does not yet define clear procedures for civil ex parte search and seizure as required by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The GOK plans to amend the Copyright Law to remedy this. However, it should be noted that a large portion of the searches for pirated material carried out by authorities are prompted by complaints made without the knowledge of the object of the search (often by means of calling a nationwide hotline), and thus, have the character of ex parte searches, although the procedure is not defined as such.

15. The most important legal change, however, will be the amendment of Article 184 of the Criminal Code to lower the threshold of severity for an offense to be treated as a criminal rather than administrative matter. In October 2004, the Ministry of Justice sent a draft law to Parliament (now under consideration by the lower house) that would:

- Dispense with the requirement that the prosecution demonstrate that the victim of the violation suffered "significant harm", or that the violation was committed for the purpose of profit;
- Introduce a simple monetary-value threshold for criminality using a multiple of the monthly indicator.

(Note: The monthly indicator is not a "wage" as indicated by the International Intellectual Property Alliance (IIPA) in its Special 301 submission. It is an amount used by the government to calculate, inter alia, fines, fees and transfer payments. The current monthly indicator is 919 tenge, or (130 tenge/USD) \$7.07. Alternatively, the court may garnish the salary or other revenues of a person convicted of a minor offense under Article 184 for one to five months. End Note.)

16. If approved, the amendment to Article 184 of the Criminal Code will remove a major impediment to the prosecution of IPR offenders. The main factor that will affect the force of the new provisions will be the size of the threshold. The Embassy has received conflicting information, but the latest figure quoted by the Ministry of Justice is one hundred monthly indicators. The amendment would thus mean that a person found in possession (for any purpose) of pirated material valued at more than roughly \$700 would be treated as a criminal. The amendment also increases the possible fines and jail terms.

17. Under the draft amendment, a person convicted for a violation involving items valued at more than 100 times the monthly index would be subject to fines of 500-700 monthly indicators, or five to ten months' salary, or 180-240 hours' labor, or a jail sentence of up to two years. Repeat offenses, offenses involving a conspiracy, especially large offenses (i.e. 500 monthly indicators or more, the current lower bound of criminality) and offenses committed by officials would be punished by two to five years' deprivation of liberty. Additionally, the proposed amendments would increase the fines applied under the Administrative Code as well. The Embassy is following these developments closely and will report any new information septel.

#### Additional Government Measures

18. In addition to the legislative efforts described above, the IPR Committee of the Ministry of Justice has continued to raise the profile of intellectual property and IPR protection issues. It continued its public awareness campaign, "Intellect," sponsoring seminars, competitions and forum discussions in cooperation with international organizations that, according to GOK sources, involved more than 2000 people. The IPR Committee also opened four new representative offices in the cities of Petropavlovsk, Shymkent, Uralsk and Ust-Kamenogorsk. These offices are primarily intended to ease registration of patents. It introduced a new Web site, [www.intellkaz.kz](http://www.intellkaz.kz), and began publishing a magazine. According to GOK sources, over 300 advertisements have been placed in the mass media, including TV and radio spots. The IPR Committee has actively sought and been receptive to training and cooperation from rights holders and organizations such as Microsoft and the International Federation of the Phonographic Industry (IFPI) to raise the competence of enforcement personnel. The GOK has had MOUs with the Business Software Alliance (BSA) and IFPI since October 2003.

19. The Ministry of Justice also took steps to improve coordination with other agencies responsible for IPR enforcement. The Ministry entered into MOUs with the Financial Police, the Customs Agency (now part of the Finance Ministry), the Procurator-General and the Ministry of Education and Science. The Ministry of Justice notes that the MOUs not only affect the procedures for conducting inspections, but also serve to involve the other agencies in all aspects of IPR enforcement, training and awareness.

#### The Enforcement Picture

10. In Reftel B, the Embassy reported that the enforcement situation in Kazakhstan was inadequate but improving, and criticized the sluggish pace of improvement. In this

reporting period, the Embassy observed marked improvements in the quantity and quality of GOK enforcement efforts. Every 2004 metric for copyright enforcement shows dramatic improvement:

Inspections: 1,365 in 2004, compared to 1,264 for 2001-2003 combined;

Seized Materials: 218,110 items seized in 2004, compared to 165,423 in 2003 - an increase of 31.8%;

(Note: This is a Ministry of Justice figure for all agencies for the entire year. The IIPA report of seizure of only 140,000 items was based on a report from the Financial Police only. End Note.)

Fines: 6,659,341 tenge (\$51,225) assessed in 2004 compared to 1,459,314 tenge (\$11,225), a nearly five-fold increase.

¶11. Enforcement of foreign trademarks also improved markedly. In 2002-2003, GOK authorities carried out only seven inspections nationwide for counterfeit products. In 2004, 195 inspections were carried out, 34,869 counterfeit items were confiscated, 848 people were punished under the administrative code, and fines were collected in the amount of 580,808 tenge (\$4,467.75.) Executives of trademark-holding companies in Kazakhstan such as Coca-Cola and Procter & Gamble have commented very favorably on the authorities' effectiveness in fighting fakes and describe the enforcement climate as greatly improved. The Embassy notes that Kazakhstan received no mention in the International Anti-Counterfeiting Coalition (IACC) 301 submission.

¶12. Kazakhstan also tightened its criminal enforcement in this reporting period. The GOK initiated 35 criminal cases under Article 184 of the Criminal Code (criminal misappropriation of copyright):

16 investigations are complete;

13 were referred to the courts;

3 cases resulted in the charges being dropped;

8 cases are temporarily suspended;

11 cases are now at trial;

3 people were convicted in 2004.

Additionally, on February 23, 2005, the Financial Police announced the beginning of criminal proceedings in Almaty in a significant software piracy case. The alleged violator was installing unlicensed Microsoft programs on computers he was selling. The authorities value the confiscated materials at \$5,380.

¶13. 29 cases were brought under Article 199 of the Criminal Code (criminal misappropriation of trademark):

19 investigations are complete;

16 cases were referred to the courts;

3 cases resulted in charges being dropped;

3 cases are temporarily suspended;

7 cases are now at trial;

3 people were convicted in 2004.

¶14. We believe that this increased enforcement has made a difference in the market share of legal products in Kazakhstan. IIPA, in its Special 301 submission, estimates that the market share of pirated audio and video cassettes and CDs in Kazakhstan is 68%, virtually unchanged from ¶2003. However, the largest retailer of licensed audio and video products in Kazakhstan estimated to an Embassy officer that he believed his market share to be about 50% and increasing.

¶15. Additionally, the Embassy has broad anecdotal evidence that it has become much more difficult to find pirated audio and video materials in Kazakhstan. No longer is one likely to find pirated materials openly on sale in bazaars or stores. One American reported that in Shymkent pirated video materials are now impossible to find. On this basis, the Embassy finds it difficult to credit the IIPA report.

¶16. Clearly, further improvements are still necessary. In a sense, Kazakhstan had nowhere to go but up, given the sad state of enforcement but a few years ago. Enforcement is still constrained due to the fairly forgiving provisions of

the current criminal law and the apparently lax sentencing pattern of the court system. Pirated goods do still apparently hold a sizable share of the market.

17. However, the GOK has made marked improvement even under the current law and has demonstrated the will to make additional changes. Also, while fines seem low, they should be evaluated in the context of the fact that per capita income in the richest parts of Kazakhstan is still only about \$220. Finally, better than 80% of the pirated material on the Kazakhstani market originates in Russia or China. While customs enforcement and procedures could surely improve, the problem of pirate market share is not going to be fully solved until the situation in those countries improves dramatically.

#### Specific Areas of Interest

18. Reftel A cites several specific areas of inquiry in the Special 301 process; comments on each are provided below.

#### Optical Media Piracy

19. There is only one large compact disc production plant in Kazakhstan. Its capacity is estimated at 8 million compact discs of various types per year. The plant has been assigned a SID code by IFPI and, as IIPA notes, provides exemplars of its product for use as forensic evidence. As stated above, the vast majority of pirated optical media available in Kazakhstan originated in China and Russia. IFPI's 2004 Commercial Piracy Report does not mention Kazakhstan.

#### Government Procurement of Software

20. According to local representatives of Microsoft, the Procurator-General has directed all GOK agencies in 2004 to ensure that all future purchases of software are from legitimate sources only. Although Microsoft has not seen the letter, and a decree analogous to a U.S. Executive Order has not been issued, the company expressed general satisfaction with the GOK's efforts to legalize all procurement. Additionally, Microsoft reported significant efforts on the part of state enterprises to legalize their procurement as well. Microsoft cited KazakhTelecom and KazTemirZholy (state rail company) as being particularly proactive in this respect. As the GOK looks forward to creating "electronic government" initiatives (and needs software company support to realize them), it appears even less likely that this will be a problem in the future.

#### TRIPS Compliance

21. Kazakhstan corrected its primary TRIPS-related deficiency, protection of pre-existing works, in 2004 (see paragraph 2, above.) The outstanding issues related to TRIPS compliance in Kazakhstan that are known to the Embassy are related to civil ex parte search procedures and the extension of ex officio authority to customs and law enforcement bodies to initiate IPR cases. As noted in paragraphs 3 and 4, above, the GOK maintains that its present law is fully TRIPS-compliant, with apparently missing authorities expressed elsewhere.

#### International Agreements and National Law

22. For reference, Kazakhstan is a party to the following international agreements:

- 1994 Treaty on Trademark Laws;
- 1968 Locarno Agreement on Establishment of International Classification of Industrial Models;
- 1971 Strasbourg Agreement on International Patent Classification;
- 1957 Nice Agreement on International Classification of Goods and Services for Trademark Registration;
- 1977 Budapest Agreement on International Recognition of Microorganisms Deposits for the Purpose of Patent Procedures;
- 1999 Agreement on Measures to Prevent and Suppression of the Use of False Trademarks and Geographic Names;
- 1998 Agreement on Cooperation on Suppression of Offenses

in the Field of Intellectual Property, and

- 1999 Agreement on Mutual Protection of Inter-State Secrets in the Area of Legal Protection of Inventions.

#### SIPDIS

Kazakhstan ratified the WIPO Treaties on Copyrights and

Performances and Phonograms in 2004.

123. For reference the following basic IPR laws were adopted in Kazakhstan from 1996-2001:

--The Law on Copyright and Adjacent Rights (1996) (Note: This law protects software programs as literary works and databases as compilations. End Note.);  
--The Patent Law (1999);  
--The Law on Trademarks, Service Marks and Names of Places of Product Origin (1999);  
--The Law on Protection of Selective Achievements (1999),  
and  
--The Law on Legal Protection of the Topology of Integrated Circuits (2001).

Comment and Recommendation

124. In 2004, we had little difficulty recommending that Kazakhstan remain in Watch List status. The quantity of seized material and number of enforcement actions had actually fallen in 2003 relative to 2002. The GOK had still not yet ratified basic international agreements and was delinquent in a significant bilateral obligation (protection of pre-existing works.)

125. This reporting period has seen remarkable progress in all areas, particularly enforcement, driven by the pressure of the Special 301 Watch List and the GOK's own desire not to fall behind Russia in the WTO accession process. While the situation is not yet perfect, we believe that Kazakhstan has turned a corner on IPR, especially with regard to enforcement. It is difficult to see what further improvements retention on the Watch List will engender; in fact it could have the opposite effect if Kazakhstan perceives that its efforts have gone unrecognized. Kazakhstan officials argue that the country has come a long way, particularly in comparison to Azerbaijan, Georgia and Estonia - all of which have higher piracy rates than Kazakhstan and none of which were recommended for the Watch List by IIPA. Based on the improvements noted in 2004, the upcoming improvement to the Criminal Code and the diminishing benefits of continuation, we recommend removing Kazakhstan from the Watch List. We would not object to conditioning removal on passage of strict Criminal Code amendments.

126. Broader U.S. interests will also be served by removing Kazakhstan from the Watch List. We note that once the Criminal Code amendments discussed in paragraphs 5-7 above are adopted, the main legal issues that will remain are those of ex parte searches and ex officio authorities, both of which can be addressed as TRIPS questions in the framework of already active negotiations. The Embassy believes that WTO accession itself will be a sufficient lever to bring about needed changes in these areas. However, it should also be noted that while the GOK is sure of its political decision to pursue WTO accession, it still needs to attract key political and business constituencies to a consensus that accession is in fact a good idea.

127. Success on Special 301 will provide a needed boost to those in the GOK who are promoting WTO-compliant reforms. We also believe that removing Kazakhstan from the Watch List will send an important message to other countries, particularly Russia and Ukraine, about the objectivity and fairness of the Special 301 process and of U.S. positions regarding IPR generally.

Ordway

NNNN